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ABSTRACT

The act of intervention into family life creates a conflict between the rights of the sexually abused child and the integrity of the family. From the child-welfare perspective, the conflict consists primarily in the ambiguity of child-welfare values which on the one hand support the sanctity of the family and on the other recognize the child's right to be free from abuse and neglect. Child-welfare professionals have not fully addressed this conflict, which is as significant as the legal conflict between children's and parents' rights. Resolution of this conflict implies support for the child's right to a family that provides the necessary care, nurturance, and socialization. Such a family would by definition be free of exploitive and coercive acts such as sexual abuse. The professional must, therefore, confront the question, "Is sexual abuse of children by parents to be tolerated?" A decision that such behavior is not to be permitted should not alter the view that state intervention is often problematic, nor should it suggest that intervention should occur in every case. Child-welfare professionals should act in conjunction with attorneys to make the legal system less victimizing for the child and punitive for the offender.
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A CHILD WELFARE PERSPECTIVE ON CHILDREN'S
VERSUS PARENT'S RIGHTS IN INCESTUOUS FAMILIES

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Introduction

Among the currently popular topics in professional and lay publications are those of sexual abuse of children and issues concerning the American family. These merge in the topic which this paper will discuss, the rights of children versus the rights of parents in families in which a parent has sexually abused his* child. The topic is complex for it raises issues of considerable emotional, factual, legal, and social disagreement such as: sexual exploitation, the sanctity of the family, child abuse, and legal versus moral rights.

The very idea of children's rights versus parents' rights communicates the conflictual nature of this topic. This paper will attempt to address this conflict from the perspective primarily of the mental health/child welfare professional. As such it is not a comprehensive review of legal concerns, although certain of these will serve as the background for thinking about the conflict from this perspective.¹ Specifically, this paper will review the nature of child and parent rights, discuss the conflict between these rights in incestuous families, and raise a number of questions which may be helpful in thinking about this conflict from a child welfare perspective.

* The masculine pronoun will be used throughout since an overwhelming majority of sex abusers are male.

Child and Parent Rights

From the earliest times, children were seen as the property of the parent and until very recently the male parent. In feudal times a father was entitled to kill or sell a child into slavery. Although this legally sanctioned power over physical life has changed in modern times, parents continue to exercise considerable power over most areas of children's lives. Indeed it has only been very recently that we have even begun to talk about children's rights at all.

Beginning in 1660, the English Chancery courts claimed the power to act in parens patriae--as an arm of the sovereign--to take guardianship of persons suffering under a disability. Children have long been regarded in law as "suffering" a disability due to their incapacity brought about as a result of immaturity. This belief in the inherent incapacity and resulting vulnerability of children has allowed the modern state, under parens patriae, to act in the child's best interests and to intervene in family life.

The power to intervene within family life has generally been exercised reluctantly. At the base of this reluctance is the American myth of rugged individualism and its inherent distrust of government. Other reasons include: the recognition of the impossibility of describing preferred child rearing and family styles (myth of cultural diversity); the recognition that children need a certain amount of love and nurturance which is supposed to be found in the intimate relationships of a family; a distrust for professional services which are required when the state intervenes with families; and a fear that state officials will try to impose their personal values in families where they intervene (Wald, 1975).

Whatever the basis, over the last fifty years the courts have recognized and supported an "autonomy system" in which the sanctity of the family and the family's right to privacy are preserved. For example, a 1953 ruling of the court referred to parent custody of a child as "a right more precious... than property rights" and held that "the fourteenth amendment included the right to the care, custody, management, and companionship of . . . minor children" (Derdeyn, 1977). In this system the right of the parent to his/her child is protected until there is clear and specific reason for the state to intervene (Fitzgerald, 1978).

The courts have supported a wide range of specific parent rights including: the right to choice of child rearing; a father's right to an illegitimate child upon the death of the mother; a right to determine a child's education and religion; a right to discipline; the right to move a child; and the right not to be deprived of a child without formal notice and hearing (see Eckelaas, 1973; Killian, 1978; and Kleinfeld, 1970 and 1971). So extensive has been the court's support for the rights of parents, it has been observed that "the scope of parental power in a particular household is restricted more by the imagination of the parent . . . than by the law" (Kleinfeld, 1970).

Nevertheless, there has been a gradual trend to recognize certain rights of children. These include rights to make certain choices and rights to be protected from choices and actions of others. Generally, the rights of children to make choices are severely limited (e.g. they are not allowed to vote, marry, drive a car, drink alcohol, work, or choose not to go to school).

Rights to be protected fall into two general categories: right to due process (e.g. rights of students in expulsions from school; the right to express dissent in schools in the absence of a clear danger of their actions) and the right not to be abused.

Although the court has confirmed that the Constitution and the Bill of Rights are not for adults alone, most of the rights of children have come about as the result of court actions in specific cases. Essentially they stand as exceptions to the general principle that children's vulnerability and incapacity make it impossible for them to make adequate decisions and consequently they need to be protected from their own actions and those of others (see Houlgate, 1980; Killian, 1978; and Baumrind, 1978 for discussion).²

The Conflict Between Parent and Child Rights

Given an alleged incident of sexual abuse within a family, we often hear that there is a conflict between the rights of the child and the rights of the parent.* It is the thesis of this paper that this conflict originates independently within two perspectives. One of these perspectives is legal, the other that of child welfare.

* Situations in which there is a conflict between the non-abusing parent and child will not be discussed in this paper.

An act of sexual abuse of a child is illegal in every state. It violates a child's right to be free of abuse and to receive care and nurturance from her parent. State intervention may take place initially through actions of the child protection agency to determine if an alleged incident has basis in fact. Intervention may also occur through the civil actions of a family or juvenile court or, on occasion, through criminal proceedings.

The law is clear that a parent may not be deprived of custody without due process of law as insured in the Constitution. Due process guarantees these rights: the right to independent council, the opportunity to be heard in recorded proceedings, the right to confront and examine those who alleged the abuse, the right to written notice and hearing, the right to have the burden of proof lie with the state, the right to have the facts determined by a jury, and the right to an appeal (Fitzgerald, 1978).

At the legal level rights may conflict in a number of ways. For example, a child's need for immediate protection and a parent's right not to be deprived of custody without due process may conflict. Even though the standard of proof is less rigorous at civil versus criminal proceedings, evidence of sexual abuse which is "clear and convincing" may not be available. The lack of such evidence in cases where in fact sexual abuse has taken place violates the child's right to protection and to be free of abuse.

The conflict in rights which is seen from the perspective of child welfare is not as well formulated. I would maintain that this is primarily because it is a conflict between a number of professional and social values concerning the family.

The family is recognized by most professionals as a fundamentally important component of life which provides for the physical and the emotional care of young children and sets the stage for psychological and social life. So important is the family in our thinking that many of us believe that maintaining the family unit is the most important goal for state and therapeutic interventions.

Occasionally, one hears that while sexual abuse of children is not desirable, a certain amount of it may be less harmful to the child than the breakup of her family. Presumably this is because of the vital nature of the family's influence on growth and development.

To analyze this argument, it is helpful to answer two questions: 1) to what extent is sexual abuse somehow a unique type of physical abuse, and 2) is there something unique about intra-family sex abuse which makes it different than extra-family abuse?

To what extent is sexual abuse somehow a unique type of physical abuse

Because sexual abuse taps the professional's own values about sexuality, this question is often very difficult for professionals to comfortably answer. As professionals we often ask ourselves to what extent we would take the actions we do in these cases (all other things being equal) should the presenting problem be physical rather than sexual abuse. In addition, there are those who point to the child's "consent" to the experience as an

indication that an assault has not taken place.

"Insofar as incest is consensual, as opposed to rape, and it involves no use of force, it is an act of violence only by metaphor" (Dickens, 1978, p. 19).

The problem with these views of sexual behavior between adults and children is that they ignore several important aspects of such behavior: First, the younger the child, the less force is required to obtain compliance. In many cases, an adult does not need to use force by the virtue of his superior skill and resources and as a direct result of the ways this culture teaches children to be compliant to adult authority. Nevertheless, in a recent report on a large sample of sexually abused children in Seattle, 29% of the abusers in intra-family sex abuse actually used force and an additional 16.2% threatened the use of force to gain child compliance. (Conte and Berliner, 1980). Coercion and exploitation are an inherent feature of adult with child sexual behavior. The use of tangible enticements (bribes), the granting of special privileges, or the giving of special status as a consequence of child compliance to sex are all coercive means that the adult may use to insure access to the child as a sexual object.

Second, children, especially young children, are incapable of giving consent to sexual relations with an adult. To give consent implies that one knows what one is consenting to (informed consent) and has the actual freedom to say yes or no. (Finkelhor, 1979). Much sexual behavior between adults and children begins at an age at which the child is completely unfamiliar with the nature of sexual behavior. What may seem to the child as

affection-seeking behavior, is to the adult sexual (Schultz, 1980).

I would suggest then, that inherent in sexual behavior between adults and children is some degree of coercion (from outright force to manipulation of adult authority) and exploitation without the child's informed consent.

On this topic, Fersch (1980) concludes:

"I would prefer, on legal and psychological grounds to subsume all such cases simply under assault. Whether the child is assaulted with a broken bottle, a penis, or a finger, and whether the assault takes place in the ear, in the vagina, or in the mouth and whether by father, or by stranger or by some other person, where there is force or coercion they are all serious matters and ought to be treated as such." (p. 305)

If we accept this view then, the issue when a family member sexually abuses a child is not only the sexual aspect of the act but that the act is inherently coercive and exploitive. While there may or may not be physical evidence of the assault such as blood, bruises or tears in the skin, the act is an invasion of the child's body and/or right to privacy.

Is there something unique about intrafamily sex abuse which makes it different from extra-family abuse?

My experience suggests that many mental health/child welfare professionals act as if there were something very different about intra- versus extra-family sexual abuse. While there is little question that state intervention is appropriate in cases where the offender is not a member of the victim's family, there is considerable concern that the state should intervene

in cases where the offender is a member of the child's family.

To begin with, it is not clear what we mean by member of a child's family. In the Seattle sample of sexually abused children (N=583), the abuser was a family member in 53.2% of all cases (natural parent 16.3%, step-parent 15.8%, other relative 15.1%, and non-related parenting figure e.g. mother's boy friend 6.0%). The abuser was an acquaintance of the child or family in 35.4%, a stranger in 8.1%, and unidentified in 2.4% of the cases. Only 16.3% of the abusers are the child's natural parent. If we feel reluctance to intervene when the abuser is a natural parent because of the possible side effects of intervention, should we feel the same when the abuser is an adult cousin or grandfather? What about those cases in which the abuser is a step-parent living in the home for less than a year?

If one were to ask what is the difference between a father, step-father, or uncle and the man next door having intercourse with a ten year old girl or sticking his finger in a five year old's vagina, one comes quickly to the heart of the issue.

There is no difference in the act itself. Additionally, we have clinical evidence to suggest that the act may be more traumatic to the child and to have gone on undetected for a longer period of time when the abuser is a family member (see Conte and Berliner, 1980a).

The reason we think differently about these cases when the abuser is a family member than when he is not, is because fundamentally we have not decided that adult sexual use of their own children is wrong.* Further, we have not decided which is worse, the sexual abuse itself or the consequences of state intervention (e.g. trauma to child, family break-up, stigmatization of child or offender.

I suggest that this position is based exclusively on our adherence to pro-family beliefs and is not supported by empirical evidence. Although controlled research documenting the effects of sexual abuse of children is lacking, there is clinical evidence that sexual abuse may be related to prostitution, drug abuse, runaway, acting out and hysterical reactions (Benward and Densen-Gerber, 1975 and James and Meyering, 1977). There is also ample testimonial evidence from adults who were sexually abused as children indicating that there are long term adverse effects (Armstrong, 1978).

Additionally, when an adult family member sexually assaults a child, he violates a trust between the child and himself (see Armstrong, 1978), and changes the way the child looks upon adults. This trust places responsibility on the adult to care and protect the child through child rearing until such time as the child is capable of independent living. The child's right to expect this care is part of the social contract which life in this society recognizes as a birth right.

The lack of clear and easily identifiable harms to the sexually abused child (such as bruises or tissue damage) together with our recognition of the vital role of family life in growth and development make us reluctant to advocate state intervention.

I would suggest an alternative formulation to the conflict question. The conflict in these cases is not between the child's and parent's rights. The parent has, by his actions, raised some question about his ability to

fulfill the responsibilities which go along with the right to custody. The conflict is between the child's right to protection and the child's right to a family, or at least to the support, nurturance, and other fundamental conditions which facilitate physical and psychological growth. While it may be preferable for a host of reasons that the child experience these conditions within her home, the child's experience of these conditions is the paramount concern. As Goldstein, Freud, and Solnit (1978) suggest,

"Whether the protective shell of the family is already broken before the state intrudes, or breaks as a result of it, the goal of intervention must be to create or re-create a family for the child as quickly as possible." (p. 5)

With such a perspective in mind, state interventions may continue to be characterized by the greatest amount of discretionary powers. Early interventions by the child protection agency or in civil proceedings can still be guided by an interest in rehabilitation and in maintaining the family unit. Selection from among alternative courses of actions may be based on the "least detrimental available alternative". (Goldstein, Freud, Solnit, 1973). Interventions into family life through criminal proceedings may remain the last alternative after others have failed to provide for the child's needs.

Other Concerns

The child welfare professional has an unusual role to play in legal concerns with sexually abused children and their families. In

the following section I would like to address a number of issues which affect this role.

1) Advocating on behalf of sexually abused children and their families within the legal system.

There is no question that many aspects of the state's intervention into the lives of sexually abused children and their families can be highly problematic (see Melton, 1980). These include: the child's having to recount the history of the abuse a number of times to police, prosecuting attorneys, and in a courtroom under an adversary legal system. The process may extend over many months and the child and non-offending parent may feel guilt and concern for the abusing parent.

In spite of some professionals' preference to the contrary, it is unlikely that the state intervention into these cases will disappear. Indeed, there are a number of reasons why state intervention may be helpful. Most importantly, the law's major function is to insure that the child is protected. It may also be an important means of helping the abusing parent/parenting figure accept his problem and insure participation in treatment (Giarretto, 1978).

To the extent that professionals regard aspects of the legal system's intervention to be problematic, efforts should be made to create accommodations to the victim within the system. Such accommodations may include: training personnel to be more effective and sensitive interviewers of young children, joint interviews with police and prosecutors so the child has to

give this abuse history only once, and preassignment of cases to a single prosecuting attorney to handle the case from pre-trial preparation through the actual trial. This reduces the number of attorneys to which the child must relate.

Even when intervention is through criminal proceedings, the outcome of intervention need not be punishment for the offender. Data from a recent sample of eighty-four offenders charged over a one-year period with a sexual assault against a child, indicate that 75% of the offenders remained in the community and of these 52% received counseling as an outcome of criminal charges. In addition, the majority of offenders (74%) pleaded guilty to charges and a trial and all its adverse consequences for the child victim did not take place (Conte and Berliner, 1980a).

This example suggests that the legal system need not operate in ways which are traumatic or non-therapeutic for the child victim, her family, or the abusing adult. Our responsibility as professionals is to recognize the legitimate concern of the state in these cases and to work with the legal system to make the necessary accommodations so as to fulfill its responsibility in ways which do not add to the victimization of sexually abused children and their families.

2) Accepting our role as participants in the legal handling of these cases.

As child welfare professionals, we are constantly called upon to make decisions which influence or are the result of state interventions.

In this capacity, we do not always operate upon the same rules and their inherent safeguards as does the legal system. Frequently, we take upon ourselves the responsibility of not reporting incidents of sexual abuse, either because we minimize the seriousness of the abuse, distrust state interventions, or believe that we already have the family under treatment. We also are called upon to provide therapeutic services to abusers as a condition of the state's not pursuing further intervention. In addition, because of our ongoing relationship with the child and family we are often in the best position to judge when reabuse takes place.

We are accustomed to thinking of ourselves as facilitators of change and not as directly responsible for what takes place in our contact with clients. While this may be accurate in psychotherapeutic endeavors, in sex abuse cases we often take on roles which should not permit this view. In addition, these roles often call upon expertise which is either highly specialized or beyond existing capabilities of our professions. For example:

- * a reliable determination about the potential for the offender to reabuse the child may call for accuracy in assessment beyond what is currently possible;

- * when we decide not to report an incident of reabuse because a family is already in treatment, we may be placing confidence in the effectiveness of therapeutic modalities which is not justified by the empirical evidence; and,

* when we tell ourselves or others that all family members may remain in the home (even when there is some question about whether reabuse will take place) because we will supervise the abuser, we make an assurance which is very difficult to deliver.

3) Deciding who is responsible for the assault.

The question of responsibility for sexual abuse of children often comes up in professional forums. Some individuals believe that sexual abuse takes place in families where there is an estranged relationship between man and wife. Others talk about a sexually seductive daughter who entices her father into bed or of a mother who may push the father to seek a sexual replacement in the daughter.

There is no controlled or rigorous research which supports the existence of either seductive young children or the association between certain familial or spousal relationships and intrafamily sex abuse. However, what is more important is that such assumptions do not explain what causes sexual abuse. There are many families with estranged familial relationships or young children who act in sensual ways where sexual abuse does not take place. The variable which distinguishes a family in which sexual abuse takes place from those in which it does not, is the presence of an adult who sexually exploits his child. The responsibility is the adult's (see Summitt and Kryso, 1978).

As services are offered to help the family "rehabilitate", the initial question is what efforts should be taken to protect the child. In many locales, the response is to remove the child from the home. This action, however, serves to remove the child from familiar surroundings and the support of the non-abusing parent at a time when she most needs a "home." This action, while motivated to protect, may seem to the child as a punishment and may covertly communicate that it is she that has done something wrong by revealing the abuse. In tune with whose responsibility the abuse actually is, the abusing parent should be the person to leave the home.

Such action communicates to child and abuser that the abuser is responsible and he must make major efforts to insure that it does not take place again in the future. In addition, and perhaps most importantly, it protects the child's right to her home and the continued support of the non-offending parent. Clearly, such action must be based on a clear assessment that the child's remaining within the home will not subject her to coercion from other family members and that she will, in fact, be protected from reabuse.

SUMMARY

The preceding pages suggest several trends in the law as it relates to children and families:

First, although there have been specific decisions extending certain rights to children, these are exceptions to the general view held in the law that children lack the capacity to exercise full rights.

Second, with the exception of a few specific situations, the parent has the right to make decisions for and about all aspects of a child's life. One such exception, is that the parent may not abuse or neglect the child.

Third, the state has exercised its right and obligation to intervene within family life only with the greatest reluctance and only after clear and specific harm to the child.

The act of intervention into family life creates a conflict between the rights of the sexually abused child and the abusing parent. This conflict originates independently in two perspectives: one legal and the other within child welfare.

Although the conflict as perceived from child welfare has not been well formulated, it appears to consist of a number of concerns including:

- * The family is very important in growth and development and should not be unnecessarily disrupted;

* State intervention into family life is a traumatic experience for the child, the non-abusing parent, and the abusing parent;

* Although sexual abuse of a child by a parent is undesirable, it is not as bad as the harms associated with state intervention into family life..

Indeed, it is the child's right to a family which facilitates the development of these aspects of life which is threatened by sexual abuse by a parent. As child welfare professionals, we have not fully addressed a conflict which is as equally important as the legal conflict between a child's and a parent's legal rights. That conflict is the child's right to a family which will provide the necessary care, nurturance, and socialization. Such a family would be free of exploitative and coercive behaviors such as sex abuse.

Resolution of this conflict and its inherent challenge to our deeply held values for children and families is based on a decision we have not fully made: is sexual use of children by an adult to be tolerated?

A decision that such behavior is not to be permitted should not alter the view that state intervention is often problematic nor is it to suggest that it should take place in every case. Child welfare professionals should continue to act in conjunction with attorneys to make the legal system less victimizing for the child and punitive for the offender.

The legal system is far ahead of many of us in child welfare for it is deeply involved in a discussion of ways in which the system may be altered for the child and family (see especially Lloyd, 1980).

Although such a discussion has begun within child welfare (see e.g. Burgess, Groth, Holmstrom, and Sgroi, 1978), it must be greatly expanded. Especially, the professional must make a fundamental decision about whether sexual abuse of children is or is not intolerable. Until such a decision is made, service will continue to be plagued with an unnecessary conflict between child and parent rights.

NOTES

1. For a more comprehensive review of children's rights, see Badal, 1977; Eekelaar, 1973; Foster and Freed, 1974; Foster, 1974; Houlgate, 1980; Killian, 1978; Kleirfeld, 1970; Kleinfeld, 1971; Margolin, 1978; Rogers, 1977; Wald, 1979; and Wald, 1974.

2. Using moral or ethical bases, a number of general statements of the rights of children have been offered.

The United Nations has issued a declaration of the rights of the child which includes in part: the right to special protection to enable him to develop physically, mentally, morally, spiritually, and socially; the right to adequate nutrition, housing, recreation, and medical services; the right (wherever possible) to grow up in the care and under the responsibility of his parents in an atmosphere of affection and of moral and material security; the right to be protected from all forms of neglect, cruelty, and exploitation. These and other versions of children's basic rights are fine goals but are not generally regarded as legally enforceable rights.

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